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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 384

GEORGE GENTILLI,
Petitioner,

v.

MORTIMER M. CAPLIN, Commissioner of Internal Revenue, DAVID C. ACHESON, United States Attorney for the District of Columbia, and ROBERT F. KENNEDY, Attorney General of the United States,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INDEX

	Page
Judgement and opinion below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions, Treaties, and Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
I. Misconstruction of *Reisman* v. *Caplin*	7
II. Conflict with *Silverthorne* and *Burdeau*	11
III. Conflict with Decisions in Other Circuits	11
IV. Unresolved Important Questions of Federal Law	13
(1) Effect of *Reid* v. *Covert Abroad* in Respect of Fourth and Fifth Amendments	13
(2) The Effect of the Violation of a Treaty in the Course of Foreign Searches and Seizures	16
(3) The Effect of a Foreign Court's Final Judgment Declaring Itself in Error	19
(4) Question of Federal Supervisory Rule in Respect of American Agents' Foreign Seizures Lacking All Semblance of Authority	19
Conclusion	20
Appendix A	20a
Appendix B	24

Page

CITATIONS

Cases:

Benanti v. United States (1957), 355 U.S. 96 9
Best v. United States (CA 1, 1950), 184 F. 2d 131 14
Bilokumsky v. Tod (1923), 263 U.S. 149 15
Boyd v. United States (1886), 116 U.S. 616 18
Bruner v. Automobile Ins. Co. (1932), 165 S.C. 421, 164 S.E. 134 19
Burdeau v. McDowell (1921), 256 U.S. 460 ..... 9, 11, 18
Cleary v. Bolger (1963), 371 U.S. 392 15
Cogen v. United States (1929), 278 U.S. 220 9
Coleman v. Page's Estate (1943), 202 S.C. 486, 25 S.E. 2d 559 19
Commissioner v. Gooch Co. (1943), 320 U.S. 418 10
Ford v. United States (1927), 273 U.S. 593 16
Gambino v. United States (1927), 275 U.S. 310 18
Go-Bart Importing Co. v. United States (1931), 282 U.S. 344 10
Goodman v. Lane (CA 8, 1931), 48 F. 2d 32 ..... 11, 12
Gouled v. United States (1921), 255 U.S. 298 18
Hilton v. Guyot (1895), 159 U.S. 113 19
Johnson v. United States (1948), 333 U.S. 10 18
Jones v. United States (1960), 362 U.S. 257 18
Ker v. California (1963), 374 U.S. 23 18
Lapides v. United States (CA 2, 1954), 215 F. 2d 253 .. 11, 12
McDonald v. United States (1948), 335 U.S. 451 18
Miller v. United States (1958), 357 U.S. 301 18
Moser v. United States (1951), 341 U.S. 41 16
Nardone v. United States (1939), 308 U.S. 338 8
Oklahoma Press Pub. Co. v. Walling (1946), 327 U.S. 186 15
Pettibone v. Cook County, Minnesota (CA 8, 1941), 120 F. 2d 850 16
Rea v. United States (1956), 350 U.S. 214 19
Reid v. Covert (1957), 354 U.S. 1 ..... 13, 14
Reisman v. Caplin (1964), 375 U.S. 440 ..... 7, 8, 9, 12
Silverthorne Lumber Co. v. United States (1920), 251 U.S. 385 ..... 8, 10, 11
United States v. Deutsches Kalisyndicat Gesellschaft (D.C.N.Y. 1929), 31 F. 2d 199 20

Page

United States v. DiRe (1948), 332 U.S. 581 17
United States v. Ferris (D.C. Cal., 1927), 19 F. 2d 925 .. 16
United States v. Foster (CA 4, 1962), 309 F. 2d 8 10
United States v. Jeffers (1951), 342 U.S. 48 18
Weeks v. United States (1914), 232 U.S. 383 18
Wong Sun v. United States (1963), 371 U.S. 471 18

Constitutional Provisions:

Fourth Amendment—Search and Seizure Clause 24
Fifth Amendment—Self-Incrimination Clause 24
Art. II, Sec. 2, Cl. 2 (Treaty Provisions) 24
Art. II, Cl. 2 (Treaty Provision) 24

Treaties:

Italian-American Income Tax Treaty

Art. II(i)(h) and (2) 28, 29
Art. XVII 29
Art. XX 29
Art. XXI 29

Italian-American Treaty of Friendship, etc.

Art. V 32

Statutes:

18 U.S.C. 1001 24
18 U.S.C. 1621 24
26 U.S.C. 6531 25
26 U.S.C. 7201 26
26 U.S.C. 7206 26
26 U.S.C. 7441-2 26
28 U.S.C. 1254(1) 27

Federal Rule of Civil Procedure 56 27

Federal Rule of Criminal Procedure 41(e) 27

Italian Provisions: Page

Constitution, Art. 13, Personal Liberty 30
General Provisions of Law, Art. 16, Treatment of the Foreigner 32
Civil Code, Art. 1340, Customary Clauses 30
Civil Code, Art. 1374, Integration of the Contract .. 30
Civil Code, Art. 2622, Divulgation of Reserved Company Information 32
Treasury Circular No. 350,300, Exchange of Fiscal Information 30
Criminal Code, Art. 110, Penalty for Those Who Participate in Crime 30
Criminal Code, Art. 622, Disclosure of Professional Secret 32
Code of Criminal Procedure, Art 340, Sequestration at Banks or Other Institutions 31
Code of Criminal Procedure, Art. 658, Manner of Execution of Rogatories Coming from Abroad .. 31

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The petitioner, George Gentilli, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on March 3, 1964.

A certified transcript of record, including the proceedings in said Court of Appeals, has been filed herein pursuant to Rule 21(1).

JUDGMENTS AND OPINION BELOW

The judgment of the United States Court for the District of Columbia Circuit is unreported and is printed in

Appendix A hereto, *infra*, p. 20a. The judgment of the Court of Appeals, containing a memorandum opinion *per curiam*, is unreported and is printed in Appendix A hereto, *infra*, p. 21.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on March 3, 1964. Appendix A hereto, *infra*, p. 21. Rehearing was denied on April 15, 1964. Appendix A hereto, *infra*, p. 22. Time for the filing of the present petition for certiorari was extended to and including August 13, 1964, by an order of this Court entered on July 15, 1964, merely granting the petitioner's motion for an extension of 30 days. Appendix A hereto, *infra*, p. 23. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTION PRESENTED

Whether there exists such an adequate remedy at law as to call for dismissal, at a pre-indictment stage, of an action in the nature of a bill in equity for suppression of evidence now in the United States and for injunctions respecting the use of the same and information based thereon, filed in a Federal District Court by a citizen of the United States living in a foreign country, against officers of the United States as such, alleging the violation against the complainant by such officers of treaties to which the United States is a party, and of the Fourth and Fifth Amendments to the Federal Constitution, through searches and seizures perpetrated against him in a foreign country by such officers or their agents, or at their instigation, for the purpose of criminal and civil use of the searched and seized items against him in the United States.

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

The provisions of the Constitution involved are the Search and Seizure Clause of the Fourth Amendment; the Clause against Self-Incrimination of the Fifth Amendment; and Art. II, Sec. 2, Cl. 2, and Art. VI, Cl. 2 of the Treaty Provisions (they are printed in Appendix B, *infra*, p. 24).

The provisions of treaties involved are Art. II (1) (h) and (2), Arts. XVII, XX, and XXI of the Income Tax Convention between the United States and Italy, TIAS 3679, United States Treaties and other International Agreements, Vol. 7, Part 3, 1956, p. 2999 et seq., operative retroactively from January 1, 1956; and Art. V, Treaty of Friendship, etc., between Italy and the United States, 1948, TIAS 1965, 63 Stat. 2255. (App. B, *infra*, pp. 28-30, 33).

The statutes involved are 28 USC 1254(1); 26 USC 6531, 68 A Stat. 815; 26 USC 7441-2, 68 A Stat. 879; 18 USC 1001; 18 USC 1621; 26 USC 7201; 26 USC 7206; Federal Rule of Civil Procedure 56; Federal Rule of Criminal Procedure 41(e). They are printed in Appendix B, *infra*, pp. 24-28.

Italian provisions involved, taken from R. 417-9, 428-9, are Italian Civil Code: Art. 1340, Customary Clauses; Art. 1374, Integration of the Contract; Italian Treasury Circular No. 350 300 (Exchange of Fiscal Information); Italian Constitution, Art. 13, Personal Liberty; Italian Criminal Code: Art. 110, Penalty for those who Participate in Crime; Art. 622, Disclosure of Professional Secret; Italian Code of Criminal Procedure, Art. 340, Sequestration at Banks or Other Institutions; Art. 658, Manner of Execution of Rogatories Coming from Abroad; Italian Civil Code, Art. 2622, Divulgation of Reserved Company Information; Italian General Provisions of Law, Art. 16, Treatment of the Foreigner. They are printed in Appendix B, *infra*, pp. 30-33.

STATEMENT OF THE CASE

Petitioner, a citizen of the United States living in Milan, Italy, where he is engaged in activities connected with the manufacture of televisions and electric refrigerators,* filed an action in November, 1961, in the nature of a bill in equity, in the District Court for the District of Columbia against the respondents as Commissioner of Internal Revenue, United States Attorney for the District of Columbia, and Attorney General of the United States, in which he prayed for an order suppressing certain documents or records searched and seized in Italy by agents of the Internal Revenue Service acting on Italian soil, or by Italian authorities at the written instigation of the Attorney General of the United States. The jurisdiction of the District Court was invoked because the official residences of the respondents are in the District of Columbia, and because petitioner, having been menaced for several years with the threat of a federal indictment for alleged tax fraud and perjury, ripening into nothing, and being formally charged with civil tax fraud, aggravated by a jeopardy assessment still tying up more than half a million dollars worth of his assets in New York—all on the basis of the searches and seizures in Italy—was powerless to stop the continuing harassment of himself except through invocation of the equity powers of the District Court for the purpose of suppression of the searched and seized items, and injunction against the use of information obtained from them.** The basis for federal jurisdiction in the District Court as the court of first instance was laid under the provisions of the statutes cited in the footnote below.[1]

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* R. 448-9. ** R. 1-19.

[1] R.S.D.C. sec. 763, Feb. 27, 1877; 19 Stat. 253, ch. 69, sec. 2; Title 11, District of Columbia Code (1951 ed.), sec. 11-306; Act of May 24, 1949, 63 Stat. 108, ch. 139, sec. 135; Title 11, District of Columbia Code (1951 ed.), sec. 11-305; and P.L. 85-554, July 25, 1958, sec. 1, 72 Stat. 415, Title 28 U.S.C.A., sec. 1331 (a).

The searched and seized items consist of three classes:

(1) Italian corporate records or documents, or photographic copies of them, taken in Italy, solely for criminal and civil use against petitioner in the United States, from the ousted president of two or more related Italian corporations, who converted them unlawfully in Italy to American use, by American Internal Revenue agents acting in conjunction with an American Customs agent, all having no semblance of the power of search or seizure of documents on Italian soil and participating in the unlawful conversion; and forwarded by one of them to the respondent Commissioner's agents in Washington, who now holds the same. (R. 5-7; 189-211; 256-259).

(2) Italian arbitration records or copies of the same, concerning a private Italian valuation arbitration between the ousted Italian president as a shareholder of the said Italian corporations and petitioner, also a shareholder in the same, as a prospective purchaser of the shares owned by the ousted president, taken unlawfully in Italy from the ousted president for the same use by the same American Internal Revenue agents and Customs agent, and likewise forwarded by one of them to the respondent Commissioner's agents in Washington, who now hold the same. (R. 7-8; 189-211; 256-259).

(3) Italian bank records consisting of photographic copies of an Italian bank's ledger sheets reflecting petitioner's personal accounts with it for a period of years, and of checks drawn by petitioner on the accounts, seized by Italian authorities at the written request of the American Attorney General under an order of an Italian court subsequently declared to have been issued in error at Italian law by the Italian Court of Appeal at Milan in an exhaustive opinion issued by it—likewise exclusively for criminal and civil use against petitioner in the United States—and sent to the American authorities in Washing-

ton where they are now held by the Commissioner and his agents. (R. 8, 20, 315-333, 380-383; 388a and b).

Under the complaint below, petitioner as an American citizen abroad, invoked his rights under the ambulatory Fourth and Fifth Amendments, with reference to the Search and Seizure Clause of the Fourth and the Self-Incrimination Clause of the Fifth, against these federal or federally fomented foreign searches and seizures, and also his rights under the Treaty Clauses of the Constitution and the Italian-American Income Tax Treaty prescribing definite and exclusive modes for exchange of fiscal information between the two Contracting States, which were not followed. He also invoked the supervisory power of the federal courts over the conduct of federal agents in matters concerning allegedly criminal acts consummated in the United States through the sending of tax returns or sworn statements thereto.

With the support of sworn high Italian expert legal opinions attached to the complaint, petitioner asserted thereunder in respect of the three classes of items searched and seized, that he had standing to object:

(1) As to the searched and seized Italian corporate documents, because he had as a shareholder in respect of them, an Italian right of privacy attaching thereto, which was violated by their seizure; and an Italian right of property therein deriving from the liquidations of the Italian corporations, likewise violated (R. 29-36);

(2) As to the searched and seized Italian arbitration documents, because he had as a party to the private valuation arbitration, an Italian right of privacy attaching to them, violation of which occurred through their seizure (R. 36-41);

(3) As to the Italian bank records, because he had an Italian right of privacy attaching to them and a right

of co-ownership therein, both of which were violated through their seizure. (R. 23-28; 42-51).

Before depositions of Italian witnesses in Italy and the United States had been completed—designed to show the irreparable damage to petitioner's reputation and property caused by the searches and seizures and their aftermath *—involving among other things the jeopardy seizure of more than half a million dollars worth of petitioner's assets in New York, of which he has indefinitely lost control **— the respondents moved under Rule 56 of the Federal Rules of Civil Procedure for summary judgment with prejudice dismissing the complaint before trial on the ground that there was no genuine issue as to any material fact and that the respondents were entitled to judgment as a matter of law. The District Court granted the motion and dismissed the complaint without opinion. On appeal, the Court of Appeals affirmed per curiam the judgment of dismissal upon a point not raised by the respondents—that there was an adequate remedy at law—upon the basis of the decision of this Court then just rendered, in *Reisman* v. *Caplin* (1964), 375 U.S. 440—"without prejudice, however, to appellant's urging his objections to the use by the Government of the documents in suit in some subsequent appropriate proceeding. See *Reisman* v. *Caplin*, 375 U.S. 440 (1964)." In this way, the Court of Appeals avoided a decision on the merits of the serious constitutional issues involved.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Misconstrues and Misapplies the Decision of This Court in *Reisman* v. *Caplin, Supra.*

The decision of the Court of Appeals, rendered only a few weeks after the decision in *Reisman* by this Court, clearly misconstrues its meaning and misapplies the de-

* R. 311. ** R. 2-3, 294.

cision. This Court is now presented with the opportunity to explain the restrictions of the scope of *Reisman* so as to stop further misunderstanding of its significance by the Courts of Appeals. Unlike the instant case, the *Reisman* case, although an action for injunction in the nature of a bill in equity, related not to items already searched and seized, but to documents which the Commissioner's special agent had subpoenaed in an effort to develop a criminal tax fraud charge, but had not obtained. The Court found that there was an adequate remedy at law because of the comprehensive procedure provided by the relevant provisions of the Internal Revenue Code (at p. 450), giving the persons not wishing production of the evidence a full opportunity to object to production before a District Court and then before a Court of Appeals (p. 449) in a proceeding that would be manifestly concerned only with the question of productivity of evidence still retained by the objectors at least until an outcome of the proceeding unfavorable to them. This is a far different situation from the one presented by the instant proceeding, in which the documents involved have already been searched and seized by one or more of the respondents or their agents, and are being actively used at present to the continuing harassment of the petitioner.[2] Therefore, the only appropriate rule to apply is that of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), that evidence illegally seized and searched is suppressible for all purposes.[3] This Court showed no intention in *Reisman* to limit in any way the rule of *Silverthorne*. The language of *Silverthorne* set forth in footnote 3 was quoted with approval by this Court in *Nardone* v. *United*

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[2] The attachments to the petition for rehearing show the continuing harassment. (R. 448 et seq.)

[3] "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all". *Silverthorne, supra*, at pp. 391-2.

States (1939), 308 U.S. 338 at 340-41, and again in *Benanti* v. *United States* (1957), 355 U.S. 96 at 103.

This Court has long recognized that an action in the nature of a bill in equity against Government officers is a proper proceeding at a pre-indictment stage for the suppression of documents seized for intended criminal use. *Burdeau* v. *McDowell* (1921), 256 U.S. 460, involving a petition in equity, at 474:

> "We do not question the authority of the Court to control the disposition of the papers, and come directly to the contention that the constitutional rights of the petitioner were violated by their seizure, and that having subsequently come into the possession of the Government, he was entitled to their return."

See also *Cogen* v. *United States* (1929), 278 U.S. 220, in which, in an application for return of evidence and suppression of information filed after indictment, this Court recognized by implication the propriety of a bill in equity brought for the return of seized papers and the suppression of evidence (at p. 225):

> ". . . Where the proceeding is a plenary one, like the bill in equity in Dowling v. Collins, 10 F. 2d 62, its independent character is obvious. . . ."

Moreover, in *Reisman*, this Court in remitting the petitioners to what it deemed to be an adequate remedy in another forum, meticulously spelled out the steps which could be taken in another proceeding involving only the question of the enforceability of the Commissioner's subpoena, in which no trial basically concerned with other issues would be interrupted and delayed by elaborate constitutional arguments in respect of the admissibility of evidence. To the contrary, in the instant case the Court of Appeals, in reserving to the petitioner the right to object "to the use by the Government of the documents in suit in some subsequent appropriate proceeding," has re-

mitted the petitioner to objection either in an existing (not a subsequent) proceeding in the Tax Court (the existence of which was carefully shown in the proceedings below),* to a subsequent criminal proceeding that the respondents or some of them may initiate at a very indefinite subsequent date,[4] or to a subsequent civil proceeding that the petitioner may start in the Tax Court for later years not presently in litigation but in active controversy, or in the Federal District Court for the Southern District of New York (the tax returns having been filed in New York County), or in the Court of Claims of the United States. This Court did not force the aggrieved party to wait for an indictment either in *Silverthorne Lumber*, *supra*, or in *Go-Bart Importing Co.* v. *United States* (1931), 282 U.S. 344 at 356. As to a civil proceeding in which the seized documents or information gathered therefrom might be offered in evidence, the normal progress of the trial would be interrupted and delayed by complicated constitutional arguments when the evidence was offered—just the thing which Rule 41 of the Federal Rules of Criminal Procedure attempts to avoid in the criminal field. The confusion caused by raising the "collateral issues" in a civil trial seems to be just as great as in a criminal one. Moreover, the only presently pending civil litigation (although more may be forced by the Commissioner) is in the Tax Court of the United States. This is a mere executive agency by statutory definition and by recognition of this Court,[5] despite its misnomer. It is an agency of extremely limited powers concerning tax deficiencies and overpayments; lacks the equity powers of

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* R. 2-3, The Tax Court proceeding has not been tried.

[4] Since the petitioner lives abroad, his absence from the United States keeps the criminal statute of limitations from running in his favor. 26 U.S.C. 6531, c. 736, 68A Stat. 815 (App. B, 25-6). *United States* v. *Foster* (CA 4, 1962), 309 F. 2d 8 at 12-13. There was no such problem in *Reisman*.

[5] 26 U.S.C. 7441-2, c. 736, 68A Stat. 879; *Com.* v. *Gooch Co.* (1943), 320 U.S. 418 at 420.

a Federal tribunal; and clearly has no power to suppress evidence or to enjoin its use, but only to exclude it on some supposedly proper basis when it is offered.

II. The Decision of the Court of Appeals Is in Conflict With the Decision of this Court in *Silverthorne* and With That in *Burdeau, Supra.*

The Court of Appeals in its decision in the instant case dismissed the bill with piecemeal relegation of the petitioner to objections to the "use" of the evidence by the "Government" in any proceeding in which it might be offered, whether criminal or civil, failing to pass upon the merits of the case. This is the opposite of what this Court did in *Silverthorne*, where, deciding the issues on the merits, it suppressed the evidence for all purposes and announced a general rule of federal law to this effect (pp. 391-2). In *Burdeau*, this Court approved the vehicle of the bill in equity at the pre-indictment stage as a mode to obtain suppression of evidence and injunction (p. 474), and then proceeded to decide the case on the merits.

III. The Decision of the Court of Appeals Is in Conflict With the Decision of the Court of Appeals for the Second Circuit in *Lapides* v. *United States* (CA 2, 1954), 215 F. 2d 253, and With That for the Eighth Circuit in *Goodman* v. *Lane*, Deputy Prohibition Administrator (CA 8, 1931), 48 F. 2d 32

In *Lapides*, the Court said (at p. 254):

> "Appellants 'motion' was in effect a complaint initiating a civil action seeking suppression of evidence said to have been illegally obtained and to restrain the United States Attorney from presenting such evidence to the grand jury. The suit thus began before any criminal proceedings by the government against appellant had been instituted, and his appeal was therefore not from an interlocutory order entered in the course of a criminal suit. Accordingly, the

order denying his motion was a final and appealable one."

In *Goodman*, the Court said (at p. 34):

> "The relief here asked, apart from return of the property, is that the defendant be enjoined from making use of certain evidence in any criminal proceedings against appellant. This is quite different from staying criminal proceedings. The relief asked is somewhat broader in scope, but of the same character as that asked in the usual motion in criminal matters to suppress evidence. The jurisdiction of equity to prevent the use in evidence of property illegally seized and/or to order a return thereof is well established. Such jurisdiction was involved or recognized in the following cases: *Burdeau* v. *McDowell*, 256 U.S. 465, 41 S.Ct. 574, 575, 65 L.Ed. 1048, 13 A.L.R. 1159; *Cogen* v. *United States*, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275; *United States* v. *Hee*, (DC) 219 F. 1019, 1021; Petition of Barber, (DC) 281 F. 550; *Friedman* v. *Yellowley*, (DC) 290 F. 248; *Sims* v. *Stewart*, (DC) 291 F. 707; *Dowling* v. *Collins*, (CCA) 10 F. 2d 62; *Applybe* v. *United States*, (CCA) 32 F. 2d 873, rehearing denied, (CCA) 33 F. 2d 897; *United States* v. *Gowen*, (CCA) 40 F. 2d 593, reversed on other points; *Go-Bart Imp. Co.* v. *United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. ——; *United States* v. *Mahon*, (DC) 42 F. 2d 571; *Dock* v. *Dock*, 180 Pa. 14, 36 A. 411, 57 Am.St.Rep. 617; *Pressed Steel Car Co.* v. *Standard Steel Car Co.*, 210 Pa. 464, 60 A. 4."

In dismissing the bill in equity in the present case in mistaken reliance on *Reisman, supra*, the Court of Appeals of necessity reached a conclusion in conflict with the views of *Lapides* and *Goodman*, as shown by the language just quoted from those two cases.

IV. The Decision of the Court of Appeals Leaves Unresolved Important Questions of Federal Law That Have Not Been, but Should Be, Settled by This Court

(1) *The Precise Effect of* Reid *v.* Covert *(1957), 354 U.S. 1, on the Application of the Search and Seizure Clause of the Fourth Amendment and of the Self-Incrimination Clause of the Fifth Amendment in Respect of Acts Perpetrated Abroad by or at the Instigation of Federal Officers or Agents Against American Citizens Abroad.*

In the course of the judgment of the Court in *Reid*, in which the constitutional right of trial by jury was extended to American citizens abroad found to have been improperly tried for foreign crimes by American courts-martial, Mr. Justice Black said the following (pp. 5-6):

> "At the beginning, we reject the idea that when the United States acts against its citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government."

And at pp. 8-9, Mr. Justice Black continued:

> "This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States . . . we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou salt not's' which

> were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments . . ."

In the course of the expressions just quoted, Mr. Justice Black cited in support of his statements, among other cases, that of *Best* v. *United States* (CA 1, 1950), 184 F. 2d 131, as an example of judicial recognition that the Search and Seizure Clause of the Fourth Amendment applies abroad in favor of the American citizen. In *Best*, a trial for treason committed against the United States abroad, in which the Court of Appeals found under the special facts that the search and seizure were not unreasonable, it nevertheless said (at p. 138):

> "For present purposes we assume, and we think it is probably so, that the protection of the Fourth Amendment extends to United States citizens in foreign countries under occupation by our armed forces. Cf. *Eisentrager* v. *Forrestal*, 1949, 84 U.S. App. D.C. 396, 174 F. 2d 961, 965, rev'd on other grounds *Johnson* v. *Eisentrager*, 1950, 339 U.S. 763 . . ."

Any implied limitation in the foregoing language of *Best* to cases of occupied territory would seem to have been overriden by the quoted statements of Mr. Justice Black in *Reid*. Yet in *Reid*, Mr. Justice Black, although announcing the judgment of the Court, was speaking in his opinion only for himself and three other members of the Court—Mr. Chief Justice Warren, Mr. Justice Douglas, and Mr. Justice Brennan. The issues raised below in the present case therefore afford this Court an opportunity to clarify the extent to which the Search and Seizure Clause of the Fourth Amendment protects the American citizen abroad in a friendly, sovereign nation against excesses there committed or fomented by agents and officers of his own home government. In view of the fact that hundreds of thousands of American citizens reside abroad and of the constantly increasing numbers of

American agents traveling abroad in respect of matters concerning American citizens there, the issue seems to present an important question of constitutionl law for resolution by this Court.

At the same time, this Court has the opportunity in the present case to clarify the extent to which the Search and Seizure Clause applies to evidence searched and seized for civil uses by agents or officers of the United States, or at their instigation. In *Cleary* v. *Bolger* (1963), 371 U.S. 392, Mr. Justice Goldberg, in his concurring opinion, said (at p. 403):

> ". . . I am well aware . . . that, indeed, the effect of the Fourth Amendment in civil cases in the federal courts is not totally settled."—saying in a footnote:
>
> "Compare *Rogers* v. *United States*, 97 F. 2d 691 (CA 1st Cir. 1938), *United States* v. *Butler*, 156 F. 2d 897 (CA 10th Cir. 1946), and *United States* v. *Physic*, 175 F. 2d 338 (CA 2nd Cir. 1949), with *United States* v. *One 1956 Ford Tudor Sedan*, 253 F. 2d 725 (CA 4th Cir. 1958)."

In *Bilokumsky* v. *Tod* (1923) 263 U.S. 149, a habeas corpus proceeding in a deportation case, the Court (at p. 355), after declaring that the deportation proceeding "was not a criminal one," stated:

> ". . . It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings . . ."

Oklahoma Press Pub. Co. v. *Walling* (1946), 327 U.S. 186, a proceeding involving the question of the Wage and Hour Administrator's right of judicial enforcement of subpoenas duces tecum issued by him in the course of investigations to determine whether petitioners were violating the Fair Labor Standards Act, seems to have proceeded on the assumption that the Fourth Amendment applies to civil proceedings against a Government officer.

Yet a clear pronouncement by the Court in the instant case that the Amendment is in fact fully operative in respect of unreasonable searches and seizures for a civil use—both criminal and civil uses of the seized documents having been here intended—would clarify another important point of constitutional law.

(2) ***The Effect of the Violation of a Treaty to Which the United States Is a Party in the Course of Foreign Searches and Seizures.***

In *Moser* v. *United States* (1951), 341 U.S. 41, this Court afforded judicial protection to a citizen of the United States in connection with the violation in regard to him of a treaty to which this country was a party. In *Ford* v. *United States* (1927), 273 U.S. 593, where individuals on a ship with whiskey had been seized by federal agents outside of the United States in violation of a treaty, the Court although rejecting an assignment of error based on the place of seizure because the defendants had not pleaded to the jurisdiction before pleading not guilty, accepted the premise that the validity of a trial after the kind of seizure there involved was a matter of federal cognizance, saying at p. 606,

> "Here a treaty of the United States is directly involved . . ."[6]

In the present case the allegations, supported by abundant evidence, show violation by the American agents perpetrating the seizures in Italy and by the Attorney General of the United States fomenting an improper Italian judicial seizure, a violation of Art. XVII of the Income Tax Convention between Italy and the United States pro-

[6] See *United States* v. *Ferris* (DC Cal., 1927), 19 F. 2d 925, involving a similar situation where the plea to the jurisdiction was sustained, with the District Court quoting the statement in *Ford* appearing above. See also *Pettibone* v. *Cook County, Minnesota* (CA 8, 1941), 120 F. 2d 850, granting redress to an individual who had suffered through violation of a treaty.

viding for the exchange by the "competent authorities" of the Contracting States of information available under their respective tax laws to the extent necessary for carrying out the provisions of the Convention or for the prevention of fraud and tax avoidance—declared by expert Italian testimony to have been the only lawful way through which the evidence here involved could have been taken for the intended purposes.* The final decree of the Court of Appeal of Milan is to similar effect.** Articles identical or almost identical to Art. XVII of the Italian-American Convention are to be found in a score or so of income tax conventions (treaties) to which this country is a party. Consequently, acts similar to those involved in the present case may be perpetrated abroad in many treaty countries in seeming violation of the clear restrictions of the various conventions. Therefore, another important question of federal law involving the construction of a treaty is presented by the instant case.

In this connection, this Court has the opportunity, in construction of the requirement of standing in connection with the suppression of evidence unreasonably seized, to determine the effect to be accorded to violation of foreign laws of privacy or property, whether or not existing in like fashion in the United States, committed in the foreign country by American agents against an American citizen. See pp. 6-7 above concerning the petitioner's allegations in the complaint respecting violations as to him of Italian law.[7] In connection with the violations of privacy set

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* R. 25-6, 35. ** R.315-333.

[7] Since there is of course no federal statute or rule of law of general operation in Italy governing American searches and seizures in Italy, the proper analogy seems to be afforded by the language of the Court in *United States* v. *DiRe* (1948), 332 U.S. 581 (at 589-90):

> "We believe, however, that in absence of an applicable federal statute the law of the state where the arrest without warrant takes place determines its validity . . . There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant except in those

forth, consider the recognition by this Court of the right of privacy as an element of standing in *Wong Sun* v. *United States* (1963), 371 U.S. 471, at 492.

> "The seizure of this heroin invaded no right of privacy of persons or premises which would entitle Wong Sun to object to its use at his trial . . ." [8]

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cases where Congress has enacted a federal rule . . ." (View of Court approved in *Johnson* v. *United States* (1948), 333 U. S. 10 at 15; *Miller* v. *United States* (1958), 357 U. S. 301 at 305; *Ker* v. *California* (1963), 374 U. S. 23 at 37). Paraphrasing, the rule would be:

> "We believe, however, that in absence of an applicable federal statute the law of the country where the search and seizure takes place determines its validity . . ."

As the searches and seizures were purely exploratory, the rule of *Gouled* v. *United States* (1921), 255 U. S. 298, and of *Boyd* v. *United States* (1886), 116 U. S. 616, comes into play under that of *Weeks* v. *United States* (1914), 232 U. S. 383. For the rule that Federal instigation taints the evidence, see *Gambino* v. *United States* (1927), 275 U. S. 310. And with *Gouled* and *Boyd* in play, the Self-Incrimination Clause of the Fifth Amendment seems to have been violated.

Even ignoring the effect of Italian law, the holding in *Burdeau* v. *McDowell*, *supra*, that Government prosecuting officers could retain stolen evidence if they did not connive in the theft was later limited to its special facts by *Gambino* v. *United States* (1927), 275 U. S. 310 at 318, and would not apply to the present case, where the American agents took directly from the embezzler and converter.

[8] *Wong Sun*, followed various relaxations of the requirement of standing by this Court. *McDonald* v. *United States* (1948), 335 U.S. 451; *United States* v. *Jeffers* (1951), 342 U.S. 48; and *Jones* v. *United States* (1960) 362 U.S. 257. In *Jones*, the Court said:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure,' one must have been a victim of a search or seizure, one against whom the search was directed." (at p. 261)

(3) ***The Effect of a Final Judgment of a Foreign Court Declaring Its Own Previous Order Resulting in a Seizure to Have Been in Error at Foreign Law.***

The Italian Court of Appeal at Milan held in its opinion (R. 315-333) that it had previously ordered the seizure of the bank records in Italy to be made through the lower court in error at Italian law, because of the failure of the Italian authorities acting at the instigation of the American Attorney General to follow the prescribed Italian procedure.[9] Yet because the bank records seized by virtue of the previous order had already been sent to Washington, the Italian Court was of the opinion that it could not technically revoke its own spent order, while finding it to have been entirely wrong.[10] This raises the important question whether under the rule of *Hilton* v. *Guyot* (1895), 159 U.S. 113, and subsequent decisions, the last order of the Court of Appeal of Milan should have been followed as the proper one in the same general matter although not technically revoking the former one.[11]

(4) ***Whether the Federal Supervisory Rule Should Be Extended to Control Unlawful Foreign Seizures for American Criminal Purposes by American Agents Lacking All Semblance of Authority on Foreign Soil.***

In *Rea* v. *United States* (1956), 350 U.S. 214, this Court enjoined a federal agent who had violated the

[9] Because of the absence of criminal judicial letters rogatory (R. 326); of operations of "judicial police" orderable during preliminary judicial investigation (R. 331); of the inapplicability of the Tax Treaty to criminal judicial investigation activities (R. 332), *etc.*

[10] R. 325, 332-3.

[11] See application of general rule that when two or more decisions of the same tribunal are not in accord with each other, the later decision is controlling. *Coleman* v. *Page's Estate* (1943), 202 S.C. 486, 25 S.E. 2d 559; *Bruner* v. *Automobile Ins. Co. of Hartford, Conn.* (1932), 165 S.C. 421, 164 S.E. 134.

Federal Rules of Criminal Procedure governing searches and seizures from using the seized items in a proceeding even in a State court. As the American agents in the present case acted in a fashion beyond the possible scope of authorization of the Federal Rules of Criminal Procedure, it seems that the Court should *a fortiori* extend its power to policing these acts directed against an American citizen with an eye to the use of the seized items in a federal criminal proceeding. If acts of this kind are not policed, American agents roaming abroad can create wide chaos in many lands, reflecting upon the character of our Government.[12]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL ORVILLE DECHERT
810 Eighteenth Street, N. W.
Washington 6, D. C.
Counsel for Petitioner

August 13, 1964

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[12] "A foreign sovereign cannot authorize his agents to violate the law in a foreign jurisdiction, or to perform any sovereign or governmental functions within the domain of another sovereign, without his consent." *United States* v. *Deutsches Kalisyndicat Gesellschaft* (D.C.N.Y., 1929), 31 F. 2d 199 at 203.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed November 26, 1962]

ORDER

There having come on for hearing on November 6, 1962, in this matter, the plaintiff's motion for a preliminary injunction, the plaintiff's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the defendants' joint motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure; and the Court having considered the pleadings and papers filed herein, and the Court having considered the stipulations executed and filed herein and the depositions taken and filed herein; and it appearing that there is no genuine issue as to any material fact, and it appearing that the defendants are entitled as a matter of law to a judgment dismissing the complaint, it is hereby

ORDERED, ADJUDGED and DECREED that plaintiff's motion for a preliminary injunction be and hereby is denied; and it is further

ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment be and hereby is denied; and it is further

ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment be and hereby is granted, and that the plaintiff's complaint be and hereby is dismissed.

DONE and ORDERED at Washington, D.C. this 26th day of November, 1962.

(Signed) Charles F. McLaughlin
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

Civil 3603-61

No. 17,565

GEORGE GENTILLI,

Appellant,

v.

MORTIMER M. CAPLIN, COMMISSIONER OF INTERNAL REVENUE, ET AL.,

Appellees.

(Filed March 3, 1964)

Appeal from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Wright and McGowan, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court of the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment —— of the District Court appealed from in this cause be, and it is hereby, affirmed without prejudice, however, to appellant's urging his objections to the use by the Government of the documents in suit in some subsequent appropriate proceeding. See *Reisman* v. *Caplin*, 375 U. S. 440 (1964).

Per Curiam.

Dated: March 3, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

No. 17,~~656~~ 565

GEORGE GENTILLI,

Appellant,

v.

MORTIMER M. CAPLIN, COMMISSIONER OF INTERNAL REVENUE, ET AL.,

Appellees.

(Filed April 15, 1964)

Before: Wilbur K. Miller, Wright, and McGowan, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the court that appellant's petition is hereby denied.

Per Curiam.

Dated: April 15, 1964

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1964

GEORGE GENTILLI,

Petitioner,

vs.

MORTIMER M. CAPLIN, COMMISSIONER OF INTERNAL REVENUE, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 13, 1964.

ARTHUR J. GOLDBERG
Associate Justice of the Supreme Court of the United States

Dated this 15th day of July, 1964.

APPENDIX B

FOURTH AMENDMENT, UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

UNITED STATES CONSTITUTION, ART. II, SEC. 2, CL. 2

He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, . . .

UNITED STATES CONSTITUTION, ART. VI, CL. 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, shall be the supreme law of the land; . . .

18 U.S.C.A. 1001. STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C.A. 1621. PERJURY GENERALLY

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that

any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter that he does not believe to be true, is guilty of perjury, and shall, except as otherwise provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

26 U.S.C. 6531.

Sec. 6531. Periods of limitation on criminal prosecutions.

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

* * * *

(4) for the offense of willfully failing to pay any tax, . . .;

(5) for offenses described in sections 7206 (1) and 7207 (relating to false statements and fraudulent documents);

* * * *

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of

the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. . . . For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.

26 U.S.C.A. 7201

Sec. 7201. Attempt to evade or defeat tax

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony, . . .

26 U.S.C.A. 7206

Sec. 7206. Fraud and False Statements

Any person who—

(1) *Declaration under penalties of perjury.*—Wilfully makes and subscribes any return, . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

shall be guilty of a felony, . . .

26 U.S.C. 7441. Status

The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court.

26 U.S.C. 7442. Jurisdiction

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

28 U.S.C. 1254. Courts of appeals; certiorari; . . .

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

* * * *

(b) *For defending party.*

A party against whom a claim . . . is asserted . . . may, at anytime, move with or without supporting affidavits for summary judgment in his favor . . .

(c) *Motion and proceedings thereon*

. . . The judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, . . .

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41 (e). Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant

was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * *

ITALIAN - AMERICAN INCOME TAX CONVENTION (TREATY)

ARTICLE II

(1) As used in this Convention:

* * * *

(h) The term "competent authorities" means, in the case of the United States, the Commissioner of Internal Revenue as authorized by the Secretary of the Treasury; and in the case of Italy, the Ministry of Finance, General Directorship for Direct Taxation.

(2) In the application of the provisions of the present Convention by one of the contracting States any term not otherwise defined shall, unless the context otherwise requires, have the meaning which such term has under the tax laws of such State.

ARTICLE XVII

The competent authorities of the contracting States shall exchange such information (being information available under the respective taxation laws of the contracting States) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or for the administration of statutory provisions against

tax avoidance in relation to the taxes which are the subject of the present Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those (including a court) concerned with the assessment and collection of the taxes which are the subject of the present Convention or the determination of appeals in relation thereto. No information shall be exchanged which would disclose any trade secret or trade process.

ARTICLE XX

The competent authorities of the two contracting States may prescribe regulations necessary to interpret and carry out the provisions of this Convention and may communicate with each other directly for the purpose of giving effect to the provisions of this Convention.

ARTICLE XXI

(1) The present Convention shall be ratified and the instruments of ratification shall be exchanged at Rome as soon as possible.

(2) The present Convention shall become effective on the first day of January of the calendar year in which such exchange takes place. It shall continue to be effective for a period of five years beginning with such first day of January and indefinitely after that period, but may be terminated by either of the contracting States at the end of the five-year period or at any time thereafter, provided that at least six months' prior notice of termination has been given and, in such event, the present Convention shall cease to be effective on the first day of January following the expiration of the six-month period.

Done at Washington, in duplicate, in the English and Italian languages, the two texts having equal authenticity, this 30th day of March, 1955.

ITALIAN CIVIL CODE

Art. 1340. Customary Clauses

Customary clauses are treated as inserted in the contract, if it does not appear that they were not wished by the parties.

Art. 1374. Integration of the Contract

The contract binds the parties not only to what is expressed in it, but also to all the consequences which are derived from it according to law, or, if they are lacking, according to custom and equity.

ITALIAN TREASURY CIRCULAR NO. 350300

The information which the two States are to exchange is that which, on the basis of the internal systems of the same, is available at each fiscal administration, provided always that there is excluded information which tends to the revelation of an industrial or commercial secret or process.

ITALIAN CONSTITUTION

Art. 13. Personal liberty is inviolable. There is not permitted any form of personal detention, inspection or perquisition, nor any other restriction of personal liberty, except by an act of the judicial authority accompanied by a written opinion and then only in the cases and the modes provided by law.

* * * *

ITALIAN CRIMINAL CODE

Art. 110. Penalty for those who Participate in Crime. When several persons participate in the same crime, each of them is subject to the penalty provided for it . . . .

ITALIAN CODE OF CRIMINAL PROCEDURE

ART. 340: SEQUESTRATION AT BANKS OR OTHER INSTITUTIONS

The judge can proceed to sequestration of . . . sums deposited in a current account and of every other thing deposited, even if contained in safe deposit boxes, at banks or other institutions, public or private, when he deems that they relate to crime, even if they do not belong to the accused or are not held in his name.

The judge has the right to examine the correspondence and all the records and documents of the bank or of the institution to trace the things to be sequestered or to ascertain other circumstances useful to the discovery of the truth. In case of refusal, he proceeds to perquisition and to sequestration of the correspondence and of whatever else is necessary.

The acts provided for by the preceding caption can never be done, not even by delegation, by officers or agents of the judicial police.

ART. 658. MANNER OF EXECUTION OF ROGATORIES COMING FROM ABROAD

Rogatories of foreign judicial authorities are made executive in the territory of the State, except for the provision of the following article, by the instruction (examining) section of the court of appeal which has jurisdiction in the place in which the requested acts are to be carried out, when these are not contrary to the provisions of law or to the general principles of the judicial organization of the State. The instruction section provides an order on the request of the public prosecutor.

* * * *

ITALIAN CIVIL CODE

ART. 2622. DIVULGATION OF RESERVED COMPANY INFORMATION.

The administrators, the general managers, the auditors and the liquidators, who, without a justifiable reason, make use for their own benefit or that of another of information obtained by reason of their office, or communicate it to others, are punished, if from the act there can be damage to the company, by imprisonment up to a year and by a fine of from 8,000 lire to 80,000 lire. The crime is punishable on complaint of the company . . . .

Italian Criminal Code, Art. 622

Art. 622. Disclosure of professional secret.

Whoever, having knowledge, by virtue of his own state or office, or by virtue of his profession or art, of a secret, discloses it, without just cause, or uses it to his own benefit or that of another, shall be punished, if harm can result from the fact, with imprisonment up to one year or with a fine of from 2,400 to 40,000 lire. The offense is punishable on complaint of the person who is harmed.

Italian General Provisions of Law, Art. 16

Art. 16. Treatment of the foreigner.—The foreigner is permitted to enjoy the civil rights appertaining to the citizen on condition of reciprocity and save the provisions contained in special laws.

Italian-American Treaty of Friendship, Commerce and Navigation

ART. V.

1. The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law . . . .

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FILED
OCT 9 1964
JOHN F. DAVIS, CLERK

No. 354

In the Supreme Court of the United States

OCTOBER TERM, 1964

GEORGE GEORGALIS, PETITIONER

v.

MORTIMER M. CAPLIN, Commissioner of Internal Revenue, DAVID C. ACHESON, United States Attorney for the District of Columbia, and ROBERT F. KENNEDY, Attorney General of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

JOHN B. JONES, JR.,
Acting Assistant Attorney General,

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 384

GEORGE GENTILLI, PETITIONER

v.

MORTIMER M. CAPLIN, Commissioner of Internal Revenue, DAVID C. ACHESON, United States Attorney for the District of Columbia, and ROBERT F. KENNEDY, Attorney General of the United States

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Neither the district court nor the court of appeals wrote an opinion.

JURISDICTION

The judgment of the court of appeals (Pet. 21) was entered on March 3, 1964. A petition for re-

hearing was denied on April 15, 1964. (Pet. 22.) By order of Mr. Justice Goldberg (Pet. 23), the time for filing a petition for certiorari was extended to August 13, 1964. The petition was filed on August 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether error was committed when, after the district court granted the government's motion for summary judgment and dismissed the petitioner's complaint for the suppression of evidence alleged to have been unlawfully seized, the court of appeals affirmed the judgment while expressly preserving the petitioner's right to raise the same objections in any subsequent proceeding in which the government might attempt to use the evidence.

STATEMENT

The petitioner filed a complaint (R. 1-16)[1] in the United States District Court for the District of Columbia, naming as respondents the Commissioner of Internal Revenue, the Attorney General of the United States, and the United States Attorney for the District of Columbia. The complaint alleged that various documents (falling into three different categories, as described below) had been obtained in Italy from persons other than the petitioner, but allegedly in violation of the petitioner's rights under the

[1] "R." will be used to refer to the joint appendix filed in the court of appeals.

Fourth and Fifth Amendments. It asked that the respondents and their agents be enjoined from using "for any purpose and at any place" (R. 14) any of the evidence thus acquired, and that the documents be ordered returned to the persons in Italy from whom they had been obtained. After considering the pleadings, stipulations, depositions and affidavits filed in the case, the district court granted, without opinion, the government's motion for summary judgment and dismissed the complaint. (Pet. 20A.) The court of appeals affirmed without opinion, but expressly providing that this was "without prejudice" to "appellant's urging his objections to the use by the Government of the documents in suit in some subsequent appropriate proceeding. See *Reisman* v. *Caplin*, 375 U.S. 440 (1964)." (Pet. 21.)

The undisputed facts, as shown by the complaint, stipulations, affidavits and depositions, are as follows. The petitioner is, and at all relevant times was, a citizen of the United States living or resident in Milan, Italy. He was engaged in importing American electrical products into Italy, and, in connection with this activity, he was a stockholder in several Italian corporations. He also maintained his own bank account at a Milan bank One Tommaso Perenich was, from 1951 to 1954, the principal officer (the "sole administrator") of two of the Italian corporations, in one of which he was also a stockholder. (R. 5, 79-82, 117-118.) One corporation was put into liquidation in 1955, the liquidation being completed in 1958; the other was completely liquidated at the

end of 1954. (R. 345, 347.) Certain differences between Perenich and the petitioner were at one time the subject of an informal arbitration proceeding in Italy, in the course of which the parties exchanged written statements, including statements concerning the value of Perenich's stock in one of the corporations. (R. 7-8, 118, 120-121.)

In 1956, the Italian government requested an American customs agent, stationed in Milan, to assist it in an investigation of smuggling operations thought to be carried on by various Italian corporations, including the two corporations mentioned above and other Italian corporations in which the petitioner had an interest. (R. 190-192.) As a result of this request, the agent talked with Perenich, who came voluntarily to the agent's office and offered to give the agent all the documents and information he had concerning the corporations of which he had previously been sole administrator. (R. 192-193.) The agent found the documents of no use to his investigation but told Perenich that an Internal Revenue Agent (of the United States) would arrive during the next few months and that he might be interested in them. (R. 206.)

In May, 1957, an Internal Revenue Agent arrived in Milan and was told about Perenich. (R. 206-256.) Perenich came to see the agent at the United States consulate in Milan and volunteered the information that one of the Italian corporations (of which he had been the sole administrator) had paid more than $500,000 to the petitioner which, he believed

the petitioner had failed to report in his federal (United States) income tax returns. Perenich left and returned later the same day with copies of ledger sheets, invoices, checks, and other documents. He voluntarily left them at the consulate and later, with his consent, they were forwarded to Washington, D. C. (R. 256-259.)

The complaint alleged that the government obtained documentary evidence (corporate records or copies thereof and records or information from arbitration proceedings) from Perenich in violation of the petitioner's constitutional rights, since Perenich allegedly violated both Italian penal statutes forbidding a corporate officer to divulge information and implied contractual duties to keep in confidence any information obtained in the course of arbitration proceedings. The complaint did not allege that the petitioner owned any of the documents, although his Italian legal expert stated in an affidavit that, after a corporate liquidation, a stockholder becomes a proportionate or fractional owner of the remaining corporate assets. (R. 34.)

Aside from the corporate and arbitration records obtained from Perenich, the complaint alleged (R. 8) that the respondent Commissioner or the Attorney General obtained copies of checks and bank statements concerning the petitioner's accounts at a Milan bank, also allegedly by unlawful seizure (R. 5). In fact, the then Attorney General, in August, 1960, wrote to the Italian Minister of Justice requesting assistance in obtaining photocopies of the petitioner's Milan bank accounts and of checks drawn on

them, for use in such criminal prosecution as might be undertaken against the petitioner. (R. 380-381.) As a result, such copies were obtained and forwarded to Washington, D. C., by order of a Milan court. (R. 20, 316-318.) Subsequently, however, the court refused to order the production or delivery of additional bank records, and wrote an opinion in which it held that its original order was in error, since Italian law permits such discovery or production only at the request of foreign judicial authorities. (R. 316-333.) The court revoked its prior order, but only to the extent that it had not already been carried out. (R. 325, 332-333.)

No criminal proceedings have in fact been brought by the United States. Indeed, the petitioner, in his brief below (p. 10), informed the court that "it has been signified to appellant that there is now no criminal investigation pending against him; but this fact does not bind such representatives against reversion to their previous attitude."

ARGUMENT

Although the courts below have declined to rule on the constitutional claims which the petitioner invited them to consider, they have not precluded an adjudication in the event that the government should attempt to use against the petitioner any of the evidence which he alleges has been seized in derogation of his rights. Clearly, this disposition was proper and there is no occasion for review by this Court.

1. In the present case, any adjudication of the merits of the petitioner's allegations of unconstitutional search and seizure would have been premature and unnecessary, since the government might never attempt to use the evidence; if it should ever seek to do so, in any proceeding instituted against the petitioner, he may object and obtain an appealable ruling at that time. In short, he has an entirely adequate legal remedy. Cf. *Reisman* v. *Caplin*, 375 U.S. 440.

The petitioner incorrectly asserts (Pet. 11-12) that the judgment below is in conflict with *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, *Burdeau* v. *McDowell*, 256 U.S. 465, and two court of appeals' decisions. None of the cited cases stands for the proposition that a federal court is obliged to grant equitable relief or to decide questions of alleged search and seizure on the merits, when the petitioner seeks no return of property but only a premature ruling on the admissibility of evidence, and when no likelihood of criminal prosecution appears.[2]

2. Although it is unnecessary to go further, we dispute the claim that the government violated the petitioner's rights under American law. Furthermore, even if our courts should undertake to reject evidence as a means of upholding foreign law, it seems clear that no law of Italy was violated, even unintentionally, by any federal representative or agent.

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[2] Even if the courts below had rendered an erroneous decision on the merits, it is doubtful whether the decision would be final and thus appealable, since the petitioner did not seek the return of any property to himself, or allege that he owned it. See *DiBella* v. *United States*, 369 U.S. 121, 131-132. But it appears unnecessary to consider that question here.

In accepting documents or copies of documents freely offered by Perenich, the Internal Revenue agent violated no rights protected by our Constitution or laws. See, *Burdeau* v. *McDowell*, 256 U.S. 465, 475. Here, on the undisputed facts, Perenich already had statements obtained in arbitration proceedings and copies of corporate records in his possession when he first spoke with a government agent in Milan; and there was, indeed, not even any evidence that he himself had obtained possession unlawfully.

At best, petitioner might contend that Perenich, in disclosing the information, violated an Italian penal statute (R. 31) punishing corporate managers who "without justified reason" disclose information with possible harmful results to the corporation (although here it would seem that there was justification and that in any event the corporations in question were either fully liquidated or in the process of liquidation). It does not follow, however, that the federal agent violated any Italian law in merely accepting the documents or information; nor did the petitioner's legal expert undertake (R. 29-36) to advance any such conclusion.

As to the documentary evidence concerning the petitioner's bank transactions, it should be sufficient to note that this evidence was obtained entirely through the order of an Italian court. The court later decided that the order was in error under Italian law, but it did not revoke the original order insofar as it had already been carried into execution.

The contention (Pet. 16-18) that the Attorney General or any other government representative or

agent violated the Income Tax Convention (Appendix below, A3-A5)[3] is plainly without merit. Article XVII (Appendix below, A4) provides that the "competent authorities" of each country "shall exchange" information "available under the respective taxation laws of the contracting States", but contains no negative provisions declaring that information may not be obtained in any other manner, *e.g.*, by voluntary transmittal from a private person, or by order of an Italian court, or otherwise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1964.

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[3] This reference is to the appendix to the petitioner's main brief in the court of appeals.

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No. 384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

GEORGE GENTILLI,

Petitioner,

v.

MORTIMER M. CAPLIN, Commissioner of Internal Revenue, DAVID C. ACHESON, United States Attorney for the District of Columbia, and ROBERT F. KENNEDY, Attorney General of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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Question Presented

The respondents' statement of the question presented does not mention the problem raised whether there exists an adequate remedy at law in the controversy, and fails to mention the presence therein of the question of the violation of a treaty and of the Fourth and Fifth Amendments to the Federal Constitution through foreign searches and seizures perpetrated or induced by American agents. (Resp. Br. 2; see Pet. 2.)

Statement

The statement of the case in the petition (P., 4, et seq) sufficiently sets forth the basic facts. As to the Statement of respondents (Resp. Br. 2, et seq), the following brief comments are made:

In respect of the remark (Resp. Br. 5) that the complaint did not allege that the petitioner "owned" any of the documents described—the complaint alleges (R. 5, 9, 12, 13)* that petitioner had a lawfully recognizable interest warranting protection in all the items seized; a proprietary interest and a right of privacy in the Italian bank accounts; a proprietary interest in records of an Italian corporation put in liquidation; and an enforceable right of secrecy in the arbitration documents—all such allegations being reinforced by high expert Italian affidavits attached to and incorporated into the complaint.[1] Irreparable injury in the premises was also alleged in the complaint (R. 3).

Concerning the statement (Resp. Br. 7) that no law of Italy was violated, even unintentionally, by any Federal representative or agent, attention is directed to the statements of Prof. Dondina (R. 30, 31, 32, 34, 35) showing the illegal nature in Italy of the acts of the former president of the Italian companies in converting corporate records to non-corporate use by delivery to the American agents; and to Article 110 of the Italian Criminal Code (P., 30), making participation in Italian crime itself an

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* "R." refers to the joint appendix filed in the Court of Appeals, unless otherwise indicated.

[1] See language of this Court in *Jones* v. *United States* (1960), 362 U.S. 257, at 266:

> ". . . We are persuaded, however, that it is unnessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . ."

offense. Likewise, the improper delivery of the secret arbitration documents constituted an illegal act in Italy (see affidavit of Prof. Dondina, R. 41), in which the American agents participated.

As to the bare statement (Resp. Br. 5) that the Attorney General wrote to the Italian Ministry of Justice requesting assistance in obtaining photostatic copies of petitioner's bank accounts, etc., the Attorney General in reality invoked primarily and completely out of context, the provisions of Article 658 of the Italian Code of Criminal Procedure, governing the manner of execution in Italy of criminal judicial letters rogatory coming from courts abroad (see text of relevant part of Article 658, P., 31); see request of Attorney General (R. 380); decision of Court of Appeal of Milan (R. 316-23, 325-6); also affidavit of Prof. Dondina at R. 24-5. No American judicial letters rogatory have been issued in the controversy. Where an American officer induces an unlawful act of seizure perpetrated by another, the taint of the seizure is attributed to him. *Gambino* v. *United States* (1927), 275 U.S. 310.

The continuing prolonged harassment of the petitioner by virtue of the respondents' wrongful possession of the seized documents is shown at R. 17-9, R. 380-3, R. 388-a and b, and R. 448-52 (Attachments Nos. 1 and 2 to Petition for Rehearing). No end of it is in sight except through the aid of equity.[2]

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[2] Although it is of minor consequence, respondents' reference (Resp. Br. 4) to "smuggling" operations thought to be carried on by certain Italian corporations, etc., by which the American customs agent at Milan (R. 190-2) may have meant "possible customs infractions," should be considered in the light of the summary judgment before trial and before completion of depositions, including those intended to be taken from Italian customs officials to show that there was no request to the agent for assistance. The reference (also Resp. Br. 4) to the payment of "more than $500,000 to the petitioner," likewise of little consequence at the present stage, is to something formally denied in the Tax Court pleadings.

Argument in Reply

(a) *The Court of Appeals Improperly Failed to Apply the Rule of* Silverthorne, *Which Requires Suppression of the Seized Items*

The disposition of the Court of Appeals was improper because it has left to the respondents the power to hold and use the unreasonably seized items indefinitely, and deprived the petitioner in the premises of his inherent right to an injunction suppressing the items and forbidding their use. It has been shown in the petition (P., 11) that this Court, under its rule in *Silverthorne Lumber Co.* v. *United States* (1920), 251 U.S. 385, requires the suppression for all purposes of unreasonably seized items of evidence; and that the Tax Court of the United States, to the pending action in which the petitioner has in effect been relegated by the Court of Appeals, lacks the equity powers (including the injunctive process) of a Federal tribunal. (P., 10).[3] If unreasonably seized items of evidence are being retained and exploited several years after the seizures, how can it be premature to suppress them? The rule complementary to that of Federal Rule of Criminal Procedure 41 (e), that equity at a pre-indictment stage (now somewhat reduced by *DiBella* v. *United States* (1962), 369 U.S. 121, to a stage, like the present one, where no criminal proceeding is "*in esse*") suppresses unreasonably searched and seized items seems to

[3] The misconstruction and misapplication by the Court of Appeals of *Reisman* v. *Caplin* (1964), 375 U.S. 440, has been shown in detail in the petition (P. 7-11). The statutory remedy deemed adequate in *Reisman* was elaborately articulated, and calculated to produce the identical relief there demanded (quashing of a subpoena duces tecum concerning items not in the Government's possession). The maximum remedy in the Tax Court in the present controversy would be mere exclusion from evidence of items which one or more of the present respondents have been exploiting for years through criminal menaces and expanding charges of civil penal liability for alleged tax fraud, already entailing irreparable injury, (R. 3-5), and which they could continue to exploit.

be so well fixed as not to be properly considered a rule of mere discretion. Application of the rule is specially indicated where the seized items are held and used by the Federal agents over a period of years with reference both to alleged crime and alleged civil liability to the Government.[4] See *Township of Hillsborough* v. *Cromwell* (1946), 326 U.S. 620, 629:

> "It follows *a fortiori* that the bill should not have been dismissed. As stated in *Greene* v. *Louisville & I. R. Co.*, 244 U.S. 499, 520, 'A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity.' . . ."

See also *Boyce* v. *Grundy* (1830), 3 Pet. (28 U.S.) 209, at 213:

> ". . . . It is not enough, that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity. . . ."

See further, *Watson* v. *Sutherland* (1866), 5 Wall. (72 U.S.) 74, at 79:

> "Commercial ruin . . . might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in . . . . The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the pleadings . . . [I]t is very clear that

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[4] Fraud is still being charged after six years, and further documents are being requested on the basis of the unreasonably seized ones (p. 3, *supra*). Criminal liability can be asserted anew at any time against an American outside the country (P., 10, *United States* v. *Foster* (C.A. 4, 1962), 309 F.2d 3 at 12-13).

the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued." [5]

(b) ***No Present Unlikelihood of Criminal Prosecution on the Basis of the Unreasonably Seized Items Diminishes the Right of Suppression Thereof***

This Court has said:

". ... It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings . . ." (*Bilokumsky* v. *Tod.* (1923), 263 U.S. 149, at 155)—

following a declaration by the Court that the deportation proceeding "was not a criminal one."

See also *Rogers* v. *United States* (CA 1, 1938), 97 F. 2d 691 at 692, where the defendant-appellant in an action of assumpsit against him by the United States for customs duties, objected to the admission into evidence of illegally seized imported whiskey; the Court of Appeals, relying on *Silverthorne, supra,* said:

"If a writ of subpoena is rendered invalid because of the use in framing it of evidence obtained by the Government in violation of the Fourth Amendment, we think that a judgment in a civil cause, in the procurement of which evidence thus illegally obtained is used, is likewise rendered invalid."

(c) ***The Point That Petitioner Does Not Pray in the Bill for the Return of Property to Him Is Immaterial***

In *McDonald* v. *United States* (1948), 335 U.S. 451, unreasonably seized evidence was suppressed as to the

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[5] The complaint in the case at bar alleges unconstitutional violations of petitioner's rights through unreasonable searches and seizures; prolonged harassment; and irreparable injury both financial and personal. (R. 2 et seq.)

movant, although not returnable to him, having been unlawfully taken from the premises of a co-defendant. Assuming *arguendo* that the movant "had no right of privacy that was broken," the Court still refused to allow him to suffer prejudice by the use of the evidence against him. (p. 456).

In *United States* v. *Jeffers* (1951), 342 U.S. 48, the seized property suppressed as to the movant was contraband not susceptible of a legal interest, and not returnable to him.

In *Jones* v. *United States* (1960), 362 U.S. 257, the seized property was again contraband not susceptible of a legal interest, and not returnable to the movant. The Court found standing, and declared that

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed . . ." (p. 261).

The relief prayed for in the complaint is variable and severable. (R. 14-16).

(d) ***The Suppression of the Evidence Would Not Be So Much the Upholding of Foreign Law as the Application of the Fourth Amendment in Respect of Foreign Acts Perpetrated or Induced by Federal Officers Against a United States Citizen Abroad***

Unless the language of Mr. Justice Black in *Reid* v. *Covert* (1957), 354 U.S. 1, 8-9,[6] is to remain a substantial vacuum in respect of foreign operation of the search

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[6] "This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States . . . we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt not's' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments . . ."

and seizure clause of the Fourth Amendment, it seems necessary to apply the Fourth Amendment to acts of Federal officers abroad and to foreign acts induced by them, by appropriate reference to the foreign law of the place of the acts within the elastic purpose of the Clause to endow the citizen with the right of privacy—bearing in mind the unchallenged rule that:

> "A foreign sovereign cannot authorize his agents to violate the law in a foreign jurisdiction, or to perform any sovereign or governmental functions within the domain of another sovereign, without his consent." *United States* v. *Deutsches Kalisyndicat Gesellschaft* (DC NY 1929), 31 F. 2d 199 at 203.

See the language of Judge Prettyman, in *Eisentrager* v. *Forrestal* (CA DC 1949), 84 App. D.C. 396, 174 F. 2d 961, 965:

> "We think that constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory. That is the nub of this whole matter. If the action of Government officials be beyond their constitutional power, it is for that reason a nullity. No more need be proven to establish its invalidity. Absent constitutional power, neither the objective nor the subject matter of an act is material . . ."

And at p. 967:

> "We think, upon the basis of the foregoing conclusions, that when a person is deprived of his liberty by the acts of an official of the United States outside the territorial jurisdiction of . . . the United States, that person's petition for a writ of habeas corpus will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailer.
>
> "The question here is not whether a court, either state or federal, can exercise its judicial power with-

in the jurisdiction of another and independent government. The question is whether it can exercise that power upon those Government officials within its territorial jurisdiction who have directive power over the immediate jailer outside the United States but acting solely upon authority of this Government. We think that it can, if that be the only means of applying the Constitution to a given governmental action."

(e) *The Holding in* Burdeau *Does Not Apply*

As shown in the petition, in *Burdeau* v. *McDowell* (1921), 256 U.S. 460, the Court accepted without question the propriety of a pre-indictment bill for the suppression of documents seized for intended criminal use in respect of a proposed ~~second~~ indictment (~~p. 391~~), and then disposed of the case on what the Court conceived to be merits (P., 9). *Burdeau* was severely limited by *Gambino* v. *United States* (1927), 275 U.S. 310, in which the Court stated that *Burdeau* was based on the fact that "no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him . . ." (p. 318). In the instant case, the circumstances respecting the corporate documents speak for themselves, in that the American agents took photographic copies of original Italian corporate documents from one whom they knew to be the ousted president of the Italian companies (R. 257; 258; 205-7).[7]

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[7] As to the arbitration records, while the circumstances may have been less suspicious, the agents took these documents "to perform [a] . . . sovereign or governmental function[s] within the domain of another sovereign, without his consent." *Deutsches Kalisyndicat Gesellschaft, supra.*

As to the bank records, the petition has shown (P., 19) that the Italian Court, as its last act in the premises, found its earlier order of seizure to have been in error at Italian law (R. 325, 332-3) —bringing up the general rule that when two or more decisions of the same tribunal are not in accord with each other, the latter decision is controlling (P., 19).

(f) *The Treaty Was Violated By All the Seizures*

The Treaty provides in Article XVII that

> "The competent authorities of the contracting States shall exchange such information (being information available under the respective taxation laws of the contracting States) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or for the administration of statutory provisions against tax avoidance in relation to the taxes which are the subject of the present Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those (including a court) concerned with the assessment and collection of the taxes which are the subject of the present Convention or the determination of appeals in relation thereto. . . ."

It further provides (Article II):

> "(h) The term 'competent authorities' means, in the case of the United States, the Commissioner of Internal Revenue as authorized by the Secretary of the Treasury; and in the case of Italy, the Ministry of Finance, General Directorship for Direct Taxation."

Italian Treasury Circular No. 350300 provides:

> "The information which the two States are to exchange is that which, on the basis of the internal systems of the same, is available at each fiscal administration, provided always that there is excluded information which tends to the revelation of an industrial or commercial secret or process." (P., 28-30).[8]

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[8] Matters in Appendix B of the petition (beginning at P., 24), inclusive of provisions of Italian law, are also in the duly designated record (R. 412 et seq.). (Designation at R. 457). By arrangement with counsel for the respondents, they were placed in the appendices to the briefs below rather than in the joint appendix for readier reference, and placed in Appendix B to the petition for the same reason.

Prof. Dondina deposed (R. 25-6):

> "Moreover, when the subject matter is connected with taxes, the exchange of information between Italy and the United States of America can occur only in accordance with the provisions of Article 17 of the Convention signed in Washington on March 30, 1955, between the two countries. (It is to be noted that Article 17 states in part: 'The competent authorities of the contracting state shall exchange such information (being information available under the respective taxation laws of the contracting states) . . .' 'Competent authorities' are defined in Article 2 (h) for Italy as 'The Ministry of Finance, General Directorship for Direct Taxation.' 'Information available' is then that which the General Directorship for Taxation has effectively at hand and which it can lawfully use; but not that which, to obtain, it would have to conduct particular actions or procedures.)"

With particular reference to the seized bank records, he continues:

> "From the foregoing it results that if any step has been taken in Italy toward any act of examination with the procedure provided for the international rogatory commission in criminal matters, the said activity must be considered 'tanquam non esset,' because it was improperly carried out, with irremediable violation, whether of the rules of criminal procedure above referred to, or of the principle of liberty and respect of the human personality which the Italian system protects in respect not only of its own citizen but also of the alien. (See Article 16 of the Preliminary Rules of the Law in General, in connection with Article 10 of the Constitution.)"[9]

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[9] See opinion of Italian Court of Appeal (R. 332):

> ". . . And one could not possibly refer to and apply, before this Court, the Washington Convention of March 30, 1955, ratified and made enforceable in Italy under the Law of July 19, 1956 No. 943, which Convention does not concern criminal judicial investigation activities.

Conclusion

For the foregoing reasons, taken in conjunction with those set forth in the petition, it is respectfully urged that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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